NEGLIGENCE—INJURY TO CHILD—TRESSPASSERS.—POWERS V. OWEGO BRIDGE CO., 89 N. Y. SUPP. 1030.—Plaintiff, a child, was injured while playing about a pile of lumber belonging to the defendant, The lumber was not near any public place and children had been repeatedly warned away from it. *Held*, that the defendent owed no duty to the plaintiff beyond that which it owed to other trespassers.

The doctrine here laid down finds much support among the latest decisions. *Paolino v. McKendall*, 24 R. I. 432; *O'Connor v. Brucker*, 117 Ga. 451; *Ann Arbor R. Co. v. Kinz*, 68 O. St. 210. The owner of attractive machinery or other property is not an insurer of infant trespassers. *Frost v. Eastern R. R. Co.*, 64 N. H. 220; nor does the fact that the trespasser is an infant raise a duty where none otherwise exists. *Nolan v. N. Y., N, H. & H. R. R. Co.*, 53 Conn. 461. A trespass by an infant is not excused because there is a temptation to commit it. *Holbrook v. Aldrich*, 168 Mass. 15. The exceptional rule of liability for injury to child trespassers imposed by the so-called "turn table" cases, *Railroad Co. v. Stout*, 17 Wall. 657, and *U. P. R. Co. v. McDonald*, 152 U. S. 252, has been often rejected. *Walsh v, Fitchburg R. R. Co.*, 145 N. Y. 301; *Delaware, Etc. R. R. Co. v. Reich*, 61 N. J. L. 635; *Ritz v. City of Wheeling*, 45 W. Va. 262. The present case seems fairly to express the general trend of the courts toward placing infant trespassers upon the same basis as adults. 11 *Harvard Law Review*, 349, 434.

NUISANCE—CEMETERY—INJUNCTION.—ELLIOTT V. FERGUSON, 83 S. W. 56 (Tex.).—*Held*, that a petition to enjoin the location of a public cemetery adjacent to one's land must show clearly and with reasonable certainty that a danger to health would ensue.

A cemetery is not a nuisance *per se*. On the contrary, under our modern civilization, cemeteries are often richly adorned and made attractive. *Lake View v. Rose Hill Cem. Co.*, 70 Ill. 192. Yet a cemetery may become a nuisance, where it endangers health by corrupting the surrounding atmosphere, *Monk v. Packard*, 71 Me. 309; or, possibly, by polluting drinking water, *Upjohn v. Board of Health*, 46 Mich. 542; *Greencastle v. Hazelett*, 23 Ind. 186. Where it is clearly proved that there will be such a danger to health, equity will intervene. *Clark v. Lawrence*, 6 Jones Eq. 83. But where the danger apprehended is doubtful or contingent, the complainant will be left to his remedy at law. *Ellison v. Commissioners*, 5 Jones Eq. 57. The few decisions upon the subject are in accord with the ruling of the present case. *Musgrove v. Church of St. Louis*, 10 La. Ann. 431; *Begein v. City of Anderson*, 28 Ind. 79; with the possible exception of *Jung v. Neraz*, 71 Tex. 396.

SALES—BREACH OF WARRANTY—ACCEPTANCE OF GOODS.—ALABAMA STEEL AND WIRE CO. V. SYMONS, 83 S. W. 78 (Mo.).—*Held*, that upon receipt of nails ordered by sample, acceptance of part of them, with knowledge that they are defective, does not waive one's right to offset damages in an action upon the price.

An acceptance of goods sold under an implied warranty, without objection, raises a presumption of a waiver of one's right to damages for their defective condition. *Babcock v. Trice*, 18 Ill. 420. This is strengthened by continued silence, *Lewis v. Rountree*. 78 N. C. 323; still more so by knowledge of the defects, *Morse v. Moore*, 83 Me. 473; and by the use of the goods, *Dayton v.*

Hoogland, 39 Ohio St. 671; without explanation, it might then be conclusive. But it is one of evidence only and is not a rule of law. *English v. Commission Co.*, 48 Fed. 196; except where the deficiency is merely formal, as of time, place, etc. *Morse v. Moore*, *supra*. This is the prevailing view in England and in most of our jurisdictions. *Chandelor v. Lopus*, *1 Smith Lead Cas.* (*8th Ed.*), pt. 1, 299, 360. Though some jurisdictions, notably New York, hold that there is a waiver by knowledge, where the warranty sprang from an essential term of the contract. *Burdick on Sales*, 135, where the two views are discussed.

SPECIFIC PERFORMANCE—DECREE AS TO PART INTEREST—INTENTION OF PARTIES.—TILLERY V. LAND, 48 S. E. 824 (N. C.).—Where one of several owners of land contracts to sell the entire property and a conveyance from the other proprietors cannot be obtained, *held*, that, since the vendor's intention was not to dispose of his own interest separately, in the absence of bad faith, specific performance as to his share will not be decreed. Clark, C. J., and Montgomery, J., *dissenting*.

In general inability to completely perform is no defense to a bill for partial performance. *Bell v. Thompson*, 34 Ala. 633; *Swepson v. Johnson*, 84 N. C. 449. This rule applies to a tenant in common who without authority agrees to sell the entire property. *Keaton v. Brown*, 57 N. J. Eq. 600. It seems, however, that the contrary would be the rule in the absence of bad faith. *Lumsley v. Ravenscroft*, 1 Q. B. 683; *Cochran v. Blout*, 161 U. S. 350. In *Jackson v. Torrance*, 83 Cal. 521, it was held that when a husband and wife agree to sell property and the wife refuses to convey, specific performance as to the husband's share will not be decreed, as such a contract was never contemplated by the parties; and, analogously, an agreement for the sale of property, including a homestead, which is void as to the homestead, cannot be specifically enforced as to the remainder. *Hall v. Loomis*, 63 Mich. 709.